

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19884
Docket Number MW-20020

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Port Terminal Railroad Association

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned and used Car Department forces to operate a roadway tractor to spread "Hurock" on the right-of-way and to fill holes on the parking lot on rest days (October 23 and 24, 1971) of Operator E. Coreathers (System Claim MW-71-3).

(2) Operator Coreathers be allowed two days' pay at his time and one-half rate.

OPINION OF BOARD: Claimant is the regularly assigned roadway tractor operator with rest days on Saturday and Sunday. On a Saturday and Sunday, a Car Department employee operated the tractor. The claimant was available to perform the work.

When the claim was handled on the property, the Carrier stated that the equipment used was the property of the Association and could be used whenever needed by the Association's various departments. Therefore, there was no violation; see letters dated November 18, 1971 and December 6, 1971, pp. 5 and 6 of Organization's submission.

The Carrier's submission to this Division stated the position of the Carrier differently. It is now contended that Car Department employees used the tractor without the knowledge or consent of the Carrier, on a voluntary basis for their own convenience and benefit; that the Carrier did not assign the work; p. 1 of Carrier's submission.

The Carrier's position on the property did not deny nor was it argued that the work did not belong to the claimant. In effect, the Carrier begged the question and in so doing admitted the merits of the claim. The Carrier's submission introduced a new position which was not stated on the property. Circular No. 1, issued October 10, 1934 under "Position of Carrier" requires that: " - - - ; and all data submitted in support of the Carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute."

The Organization's letters dated December 1, 1971, and January 12, 1972, Carrier's Exhibits "C" and "E", set forth claimant's eligibility for the work. This was not refuted by the Carrier. Rule 16 (A), of the

Agreement established claimant's right to time and one half pay if he had performed the work. Prior Awards of this Division No. 9261, No. 19123 and No. 19722 establish that material statements which are not denied or refuted are deemed to be admitted. Prior Award No. 19722 and Awards cited therein also support our opinion that: " - - - Carrier's defense is limited to the reasons given by the Highest Officer on the property."

However, it is the expressed policy of the Board in many prior Awards that pay for work not performed shall be limited to straight time pay.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

Claim (1) is sustained.

Claim (2) is sustained to the extent that claimant be allowed two days' pay at straight time.

A W A R D

Claim No. 1, sustained.

Claim No. 2, sustained to the extent set forth in FINDINGS.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 8th day of August 1973.